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9  
10 UNITED STATES DISTRICT COURT  
11  
12 NORTHERN DISTRICT OF CALIFORNIA

13 NAVNEET GHOTRA, ) Case No.: C07 4428 MMC  
14 )  
15 Petitioner, )  
16 )  
17 v. ) NOTICE OF MOTION AND MOTION FOR  
18 ) EMERGENCY STAY OF EXECUTION AND  
19 ) APPLICATION FOR TEMPORARY STAY  
20 ) ORDER PENDING APPEAL  
21 ) [FRAP, Rule 8(a)(1)]  
22 MICHAEL CHERTOFF, Secretary, )  
23 Department of Homeland )  
24 Security, NANCY ALCANTAR, Field )  
25 Office Director, Immigration ) [Alien Registration No.:  
A77 381 997]  
and Customs Enforcement, and )  
ALBERTO GONZALES, Attorney )  
General of the United States, )  
Respondents. )

Navneet Ghotra, petitioner herein, hereby respectfully  
moves the United States District Court for an order staying the  
detention and removal of petitioner to India pursuant to the  
administrative order of removal issued by the Board of  
Immigration Appeals (hereinafter BIA) on or about August 29,  
2003 by the Department of Homeland Security, United States of  
Immigration and Customs Enforcement, San Francisco District

1 (hereinafter DHS/ICE) by and through the San Francisco District  
2 deportation unit, 630 Sansome Street, 5<sup>th</sup> Floor, San Francisco,  
3 California 94111, pending disposition of the appeal of the  
4 judgment and order dismissing her petition for writ of habeas  
5 corpus before the United States District Court, Northern  
6 District of California, issued by the Honorable Maxine M.  
7 Chesney, United States District Judge, on or about October 15,  
8 2007. Appeal to the United States Court of Appeals for the  
9 Ninth Circuit was taken on or about October 19, 2007.

10 This application is made pursuant to Federal Rules of  
11 Appellate Procedure, Rule 8(a)(1).

12 Petitioner further respectfully moves the United States  
13 District Court for a temporary stay of the execution of the  
14 aforementioned final order of removal by the respondents,  
15 pending a ruling on the present motion. Maharaj v. Ashcroft 295  
16 F3d 963, 964-6 (9<sup>th</sup> Cir. 2002).

17 Execution of the final order of removal by DHS/ICE is  
18 imminent since petitioner is in the constructive custody of  
19 respondents herein and removal to India is imminent since the  
20 DHS/ICE is in receipt of a travel document with a reporting date  
21 of November 7, 2007. Accordingly, petitioner requests that a  
22 temporary order of emergency stay of execution of the final  
23 order of removal pending a ruling on the motion for stay.  
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## II

## ISSUES ON APPEAL

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3 1. The District Court, having found jurisdiction over the  
4 petition for writ of habeas corpus under Singh v. Gonzales \_\_\_  
5 F3d \_\_\_ (9<sup>th</sup> Cir. 8/24/07, Case No. 05-16005), erred as a matter  
6 of law and fact in finding that the failure of petitioner's  
7 counsel of record in post-final administrative order review  
8 proceedings under 8 USC, Section 1252 to raise the issues of: a)  
9 ineffective assistance of prior counsel in the administrative  
10 proceedings based on his failure to consolidate petitioner's  
11 removal proceeding with that of her father's removal proceeding,  
12 who was represented by the same counsel; to timely introduce  
13 available corroborating evidence in support of petitioner's  
14 claims; and to call her father as an available corroborating  
15 witness, all of which are errors evident on the face of the  
16 record; and b) to raise an equal protection claim and failure of  
17 the BIA to apply its own regulations in the petition for review  
18 proceedings since petitioner's father was granted relief under 8  
19 USC, Section 1231(b)(3) on a claim derivative of petitioner's  
20 claim for relief and which was raised in a "letter motion"  
21 before the Board of Immigration Appeals (hereinafter BIA), but  
22 was not thereafter raised by counsel before the Court of Appeals  
23 after the BIA failed to rule on the matter, disregarding the  
24 "letter motion" as inadmissible "additional evidence" rather  
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1 than a motion or, alternatively, to raise the issue of the BIA's  
2 failure to reconcile the two conflicting removal decisions under  
3 8 CFR, Section 1003.1(e)(6)(i) before the Court of Appeals, does  
4 not constitute ineffective assistance of counsel after entry of  
5 a final administrative order of removal reviewable in habeas  
6 corpus proceedings under Singh. Singh, at 10473-4, 10486-8;  
7 Castillo-Perez v. INS 212 F3d 518, 524-8 (9<sup>th</sup> cir. 2000); Escobar  
8 Grijalva v. INS 2006 F3d 1331, 1334-5 (9<sup>th</sup> Cir. 2000); Njunga v.  
9 Ashcroft 374 F3d 765, 771 n.4 (9<sup>th</sup> Cir. 2004); Wong v. Ashcroft  
10 341 F3d 1015, 1019, n.2 (9<sup>th</sup> Cir. 2003); 8 CFR, Section  
11 1003.1(e)(6)(i); Romero de Silva v. Smith 773 F2d 1021, 1025  
12 (9<sup>th</sup> Cir. 1985).

13 2. The loss of the right to review of the foregoing  
14 constitutional, statutory and regulatory issues under 8 USC,  
15 Section 1252(b)(1) violates the due process clause of the Fifth  
16 Amendment under Singh, with the appropriate remedy being a  
17 remand to the BIA to address the issue of the two unreconciled  
18 conflicting decision and orders of the BIA, a remedy which does  
19 not require review of a final order of removal. Singh at 10473-  
20 4; 10486-8.

22 The error and omission herein occurred after entry of the  
23 final administrative order by the BIA on August 29, 2003 and  
24 does not require review of the final order itself. Accordingly,  
25

1 the District Court has jurisdiction under Singh as the District  
2 Court correctly found.

3 **III**

4 **BASIS FOR STAY MOTION**

5 The basis for this motion is as follows:

6 Petitioner incorporates by reference her Petition for Writ  
7 of *Habeas Corpus* or, In the Alternative, Order to Show Cause,  
8 and the attached exhibits, in support of the factual basis for  
9 this motion set forth below.

10 1. Petitioner is a citizen and national of India who was  
11 born on or about January 17, 1978, at Talwandi Salhan, Punjab,  
12 India, and who has been present in the United States of America  
13 since August 30, 1998 when she was admitted under an H-4 non-  
14 immigrant visa. She is married by religious ceremony only to  
15 Rajinder Pal Singh, also an Indian citizen and national. The  
16 couple has two minor United States citizen children, Carol  
17 Singh, age 6, and Kevin Tej Singh, age 8 months. Petitioner and  
18 her family reside in Bakersfield, California, where they own  
19 their own residence and petitioner's spouse owns and operates  
20 two tobacco stores.

22 2. Petitioner is the daughter of Kulwinder Singh, who was  
23 originally admitted to the United States under a non-immigrant H-  
24 1-B visa and is now a lawful permanent resident alien.

1           3.     Petitioner herself was admitted as an H-4 dependent non-  
2 immigrant of her father at San Francisco, California on or about  
3 August 30, 1998. She applied for political asylum before the  
4 Asylum Office of the San Francisco District of the former  
5 Immigration and Naturalization Service (hereinafter AO/INS).

6           4.     On or about November 13, 1998 the AO/INS referred the  
7 application to the Office of the Immigration Judge, San Francisco,  
8 California (hereinafter OIJ/SF) and a notice to appear  
9 (hereinafter NTA) was issued.

10          5.     After Hardeep Rai, of Rai and Associates, entered an  
11 appearance on behalf of petitioner before the OIJ/SF on or about  
12 May 18, 1999, a motion to change venue to the Office of the  
13 Immigration Judge, Los Angeles, California (hereinafter OIJ/LA)  
14 was filed and thereafter granted on or about July 10, 1999 since  
15 petitioner moved to the Los Angeles District.

16          6.     On or about July 21, 1999, Ronald Peake, an attorney  
17 at law, entered an appearance on behalf of petitioner before the  
18 OIJ/LA. Mr. Peake subsequently entered an appearance on behalf  
19 of Kulwinder Singh, petitioner's father, before the OIJ/LA and  
20 prosecuted his application for political asylum and withholding  
21 of removal under 8 USC, Section 1158 and 1231(b)(3) and Article  
22 3 of the United Nations Convention Against Torture and Other  
23 Cruel, Inhuman or Degrading Treatment or Punishment, as ratified  
24 (hereinafter UNCAT) in Matter of Kulwinder Singh, Case No. A71  
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1 484 844 on claims derivative of petitioner's and based on a  
2 common nucleus of facts. Based on information and belief, Peake  
3 never moved to consolidate the actions before the OIJ/LA.

4 7. After the granting of one continuance for the receipt  
5 of documents from India and the denial of a second continuance,  
6 hearing on petitioner's application for relief under 8 USC,  
7 Section 1158 and 1231(b)(3) and UNCAT was held on or about  
8 November 19, 2001 before the Honorable Charles A. Del Bene,  
9 immigration judge, OIJ/LA. Peake sought admission of primary  
10 documents in support of petitioner's claims, which he received  
11 from petitioner in time for a timely filing but which were  
12 inexplicably filed late by Peake and then withdrawn without  
13 argument when asked by the immigration judge to explain the  
14 late submission. Despite the presence at time of hearing of  
15 petitioner's father and an unidentified uncle as precipitant  
16 witnesses, Peake declined to call them to testify. Petitioner  
17 was thus the sole witness called to testify in the proceeding  
18 and the application was supported by a copy of her passport, but  
19 no other documents as a result of her then counsel's failure to  
20 timely submit documentation. At the conclusion of the hearing,  
21 the immigration judge denied the applications based on an  
22 adverse credibility finding and removal to India was ordered.

24 8. Thereafter, a hearing was held on the merits of  
25 petitioner's father's application for relief under 8 USC,

1 Sections 1158 and 1231(b)(3) and UNCAT before the Honorable  
2 Darlene R. Seligman, immigration judge, OIJ/LA, on or about  
3 April 23, 2002, in which Kulwinder Singh was also represented by  
4 Peake. Relief was granted Kulwinder Singh under 8 USC, Section  
5 1231(b)(3), which is a matter of law, not discretion, based on  
6 the same nucleus of facts in petitioner's claims.  
7 Administrative appeal was waived by DHS.

8 9. A timely notice of administrative appeal to the BIA  
9 was filed on behalf of petitioner on or about December 17, 2001  
10 by Rai and Associates, who reentered an appearance for the  
11 administrative appeal. Rai and Associates filed a brief on or  
12 about July 1, 2002, arguing issues of credibility only, with no  
13 reference to ineffective assistance of counsel by Peake.  
14 Thereafter, Rai and Associates filed a letter with a copy of the  
15 decision and order of the immigration judge in Kulwinder Singh's  
16 removal proceeding along with a notarized affidavit from  
17 Kulwinder Singh, stating that there was, in essence, a common  
18 factual basis for his daughter's and his claims and noting the  
19 two different results before the two different immigration  
20 judges. Rai and Associates thereafter filed a document entitled  
21 "reform regulation brief" with the BIA on or about September 26,  
22 2002 requesting a three judge panel in which it was noted in  
23 passing that a three panel is necessary to resolve conflicting  
24 decisions of different immigration judges, without any reference  
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1 to the aforementioned documents regarding petitioner's father's  
2 case. At all times mentioned herein, respondent Gonzales'  
3 regulations set forth procedures to resolve conflicting  
4 immigration judge decisions under 8 CFR, Section  
5 1003.1(e)(6)(i).

6 10. On or about August 29, 2003 the BIA issued a final  
7 administrative order dismissing the administrative appeal. In a  
8 footnote, the BIA apparently referred to and characterized the  
9 letter regarding Matter of Kulwinder Singh, A71 484 844, as  
10 "additional evidence" and cited a "standard rule" that the BIA's  
11 review is restricted to the record before the OIJ.

12 11. Thereafter, Rai and Associates filed a petitioner for  
13 review with the United States Court of Appeals for the Ninth  
14 Circuit (hereinafter Court of Appeals) in Ghotra v. Ashcroft,  
15 Case No. 03-73515 on or about September 26, 2003.

16 12. On or about April 19, 2004, Rai and Associates,  
17 through George Heridis, an attorney at law, filed a brief in  
18 Case No. 03-73515. In essence, the brief argued credibility  
19 issues, but failed to raise the issue of the unaddressed  
20 "motion/reform regulation brief" as to the conflicting decision  
21 in Matter of Kulwinder Singh, A71 484 844. Based on information  
22 and belief, at no time did Hardeep Rai, George Heridis or any  
23 other attorney of Rai and Associates purporting to represent  
24 petitioner in the federal review proceeding raise the issue of  
25

1 the failure of the BIA to address the conflict between the  
2 aforementioned case and petitioner's case before the  
3 administrative agency of respondent Gonzales despite raising the  
4 issue before the BIA.

5 13. Based on information and belief, on or about December  
6 15, 2004 the Court of Appeals denied the petition for review and  
7 the mandate issued on or about March 9, 2005 after a petition  
8 for panel rehearing was denied.

9 14. On or about April 18, 2007 respondent Nancy Alcantar  
10 and her delegates of DHS/ICE detained petitioner in Bakersfield,  
11 California and then released her subject to an order of  
12 supervision pending execution of the removal order. At no time  
13 prior to her detention on or about April 18, 2007 had petitioner  
14 received notice of the dismissal of her appeal and the issuance  
15 of the mandate by the Court of Appeals from Rai and Associates,  
16 from the respondents and their delegates, or from any other  
17 source.  
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19 15. On the same date of her detention, petitioner's  
20 spouse, Rajinder Pal Singh, was also detained by respondent  
21 Alcantar and incarcerated at the Santa Clara County Jail. After  
22 the filing of a habeas corpus petition in Rajinder Pal Singh v.  
23 Chertoff, et. al. United States District Court, Northern  
24 District of California, Case No. C07-3943 MMC, Rajinder Pal  
25 Singh was released on bond on or about August 17, 2007 by DHS

1 upon entry of a stipulation for abeyance. In the interim, the  
2 family financial situation was adversely affected since  
3 petitioner's husband was unable to manage his two tobacco  
4 stores, the primary source of the family income.

5 16. Based on information and belief, at no time in the  
6 Court of Appeals proceeding did the attorneys of Rai and  
7 Associates representing petitioner raise the issue of  
8 ineffective assistance of counsel by Peake in failing to timely  
9 file and offer into evidence the corroborating evidence, or to  
10 call Kulwinder Singh as a witness at time of hearing, or to move  
11 to consolidate petitioner's proceeding with Matter of Kulwinder  
12 Singh, A71 484 844, before the OIJ/LA.

13 17. Based on information and belief, at no time in the  
14 Court of Appeals proceeding did the attorneys of Rai and  
15 Associates representing petitioner raise the violation of the  
16 equal protection component of the due process clause inherent in  
17 the conflicting immigration judge decisions in petitioner's  
18 administrative proceeding and Matter of Kulwinder Singh A71 484  
19 844 or the failure of the BIA to address the issue raised by Rai  
20 and Associates in the administrative appeal on review.

22 18. At all times mentioned herein petitioner had a right  
23 to effective assistance of counsel secured by the due process  
24 clause of the Fifth Amendment to the federal constitution,  
25 including proceedings after issuance of a final administrative

1 order of removal. Singh, at 10473-4; 10486-8; Dearinger ex.  
2 Rel. Volkova v. Reno 232 F3d 1042, 1045-6 (9<sup>th</sup> Cir. 2000).

3 19. At all times mentioned herein, it was and is a  
4 violation of the equal protection component of the due process  
5 clause to render different decisions between similarly situated  
6 aliens in separate proceedings involving a common nucleus of  
7 facts. Njuguna v. Ashcroft 374 F3d 765, 771, n.4 (9<sup>th</sup> Cir.  
8 2004); Wang v. Ashcroft 341 F3d 1015, 1019, n.2 (9<sup>th</sup> Cir. 2003).  
9 At all times mentioned herein, petitioner was entitled to the  
10 protection of the equal protection component of the due process  
11 clause and of the due process clause itself as an alien in  
12 removal proceedings. Zadrydas v. Davis 533 US 678, 692-3  
13 (2001); Plyler v. Doe 457 US 202, 212 (1982); Accardi v.  
14 Shaughnessy 347 US 260 (1954).

15 20. At all times mentioned herein, the relief sought under  
16 8 USC, Section 1231(b)(3) is mandatory, and not discretionary  
17 under respondent Gonzales' administrative decisions. Matter of  
18 Lam 18 I&ND 15 (BIA 1981). Accordingly, a liberty interest is  
19 implicated by the disparity in the two administrative decisions.  
20 INS v. St. Cyr 533 US 289, 307-8 (2001).

21 21. On or about August 27, 2007 petitioner filed her  
22 petition for writ of habeas corpus or, in the alternative,  
23 order to show cause (hereinafter petition) with the United  
24 States District Court, Northern District of California.  
25

22. After briefing, the District Court vacated an October 12, 2007 hearing date, issued a decision denying the petition on or about October 12, 2007 and entered judgment on or about October 15, 2007.

23. Notice of appeal to the United States of Appeals for the Ninth Circuit was filed on or about October 19, 2007.

## V

## STANDARDS FOR STAY

Under the holding in Maharaj v. Ashcroft 295 F3d 963, 964-6 (9<sup>th</sup> Cir. 2002) and Abassi v. INS 143 F3d 513, 514 (9<sup>th</sup> Cir. 1998) petitioner respectfully submits that she is likely to prevail on the merits or, alternatively the issues herein are serious legal questions and the balance of hardships favor petitioners in that:

As to the violations of the due process clause of the Fifth Amendment, and the equal protection component thereof, petitioner has experienced prejudice since:

a. The violation is a clear, unequivocal error of law;

b. Petitioner is the mother of two minor United States citizen children.

c. Petitioner is the spouse of a homeowner, subject to a mortgage.

d. Petitioner will be barred from reentry for at least five years if removed. 8 USC, Section 1182(a)(9)(A)(i).

1 e. Petitioner and her husband, also before this court in an  
2 appeal proceeding, are deemed vital to the continued cooperation  
3 of a citizen informant in an ongoing, unrelated investigation by  
4 the California Department of Justice and the United States Bureau  
5 of Alcohol, Tobacco and Firearms.

6 f. Petitioner will be precluded from presenting further  
7 evidence in support of her application for relief under 8 USC,  
8 Section 1231(b)(3) on remand if removed.

9 If removed, petitioner will be separated from her family,  
10 unable to support them and will be barred from seeking further  
11 relief despite the constitutional and statutory deprivations  
12 herein.

## 13 VI

### 14 IMMINENT REMOVAL PENDING

15 Petitioner is in the constructive custody of respondents and  
16 is subject to removal from the United States of America to India  
17 at any time by the Department of Homeland Security, Bureau of  
18 Immigration and Customs Enforcement, by and through 630 Sansome  
19 Street, Room 548, San Francisco, California 94111, with a report  
20 date of November 7, 2007. On or about October 29, 2007 a copy of  
21 this application was served on the United States Attorney Office,  
22 Northern District of California, at 450 Golden Gate Avenue, 9<sup>th</sup>  
23 Floor, San Francisco, California by e-filing.  
24  
25

1 WHEREFORE, petitioner respectfully prays that the United  
2 States District Court issue an order:

3 1. Temporarily staying the execution of the administrative  
4 order of removal set forth herein by the Immigration and Customs  
5 Enforcement, Department of Homeland Security pending disposition  
6 of this motion for stay.

7 2. Staying the detention of petitioner by respondents  
8 pending disposition of this motion for stay.

9 3. Staying execution of the final order of removal set  
10 forth herein pending disposition of the appeal herein; and

11 4. Granting other such relief as the Court deems just and  
12 proper.  
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14 Dated: October 29, 2007

15 JAMES TODD BENNETT  
16 Attorney for Petitioner  
NAVNEET GHOTRA  
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